TABLE OF CONTENTS

Page

OPINIONS BELOW 6
JURISDICTION 6
QUESTIONS FOR REVIEW 6
STATUTES INVOLVED 6
STATEMENT OF THE CASE 7
ARGUMENT:

I. In finding no Robinson-Patman Act violation the Court of Appeals and the Trial Court decided an important Federal question in conflict with applicable decisions of the Supreme Court 8

II. In finding no damages for a Robinson-Patman violation the Court of Appeals applied the wrong standard and disregarded an applicable decision of this Court 10

III. The Court of Appeals erred in finding no damages provided for violations of the Sherman Act 11

IV. The Court of Appeals erred in holding that the Trial Court's "implicit holding" that the admitted price discrimination was not violative of the Sherman Act was justified because "the pricing practice was one of over thirty years standing" 11

V. The determination of the lower courts that the Pioneer was entitled to only nominal damages on the Sherman Act violation and proved no damages on the Robinson-Patman Act count disregarded facts clearly proved 12

CITATIONS

Page

United States v. Singer
374 U.S. 174, 10 L.Ed.2d 823, 83 S.Ct. 1773 8

Federal Trade Comm. v. Borden Co.
383 U.S. 637 9

Federal Trade Commission v. Anheuser-Busch, Inc.
363 U.S. 536, 4 L.Ed.2d 1385, 80 S. Ct. 1267 9

United States v. Singer Manufacturing Company
374 U.S. 174, 10 L.Ed.2d 823, 83 S.Ct. 1773 10

Elyria-Lorain Broadcasting Company v. Lorain Journal Company
298 F.2d 356, 6th Cir. 11

Kansas City Star Co. v. United States
240 F.2d 643, cert. denied 354 U.S. 923 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1841

The Morning Pioneer, Inc.,

Petitioner

-vs-

The Bismarck Tribune Company,
A Corporation,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, in The Morning Pioneer, Inc. v. The Bismarck Tribune Company, a Corporation, its No. 73-1036, is copied in the Appendix of the Petition for Writ of Certiorari.

The opinion of the Trial Court in Civil No. 996 can be found at 342 F. Supp. 1138 (1972).

JURISDICTION

The opinion of the Eighth Circuit Court of Appeals was filed March 12, 1974, affirming the decision of the lower court.

Petitioners claim jurisdiction in the Supreme Court based upon 28 USC 1254, subd. 1.

QUESTIONS FOR REVIEW
(As set forth by Petitioner)

I. In finding no Robinson-Patman Act violation the Court of Appeals and the Trial Court decided an important Federal question in conflict with applicable decisions of the Supreme Court.

II. In finding no damages for a Robinson-Patman Act violation the Court of Appeals applied the wrong standard and disregarded an applicable decision of this Court.

III. For the same reasons stated in II. above, the Court of Appeals erred in finding no damages proved for violations of the Sherman Act.

IV. The Court of Appeals erred in holding that the trial court's "implicit holding" that the admitted price discrimination was not violative of the Sherman Act was justified because "the pricing practice was one of over thirty years standing".

V. The determination of the lower courts that the Pioneer was entitled to only nominal damages on the Sherman Act violation and proved no damages on the Robinson-Patman Act count disregarded facts clearly proved.

STATUTES INVOLVED
(Set forth in full in Petition for Writ of Certiorari)

STATEMENT OF THE CASE

This is an action brought by the Morning Pioneer, a morning newspaper of Mandan, North Dakota, against the Bismarck Tribune, an evening paper published in Bismarck, North Dakota. The two towns are about 5 or 6 miles apart, Bismarck being considerably larger than Mandan and the Tribune being the dominant paper in the area.

The Pioneer alleges that the Tribune was guilty of violations of the Robinson-Patman Act and the Sherman Act. The allegation of a Robinson-Patman violation is based on the fact that historically and until 1970, the Tribune had sold by carrier 5¢ cheaper per week in Mandan than it did in Bismarck. This price differential preceded the Robinson-Patman Act and was the apparent result of a management conclusion that the Tribune in Mandan had a lesser value than it did in Bismarck.

This conclusion appears to be founded upon the fact that the Tribune did not have the Mandan legal publications (it is in another county), had no local news and was printed earlier than the Bismarck edition, thus occasionally missing late-breaking stories. Notwithstanding this fact, there was only one brief period when the Tribune by carrier was cheaper than was the Pioneer by carrier and that came about by an increase in the Pioneer rate, not a decrease in the Tribune rate. For much of the time in question, the Tribune cost more by carrier in Mandan than did the Pioneer by carrier, irrespective of the fact that there may have been a price differential between the Tribune in the two towns.

The alleged Sherman Act violations were several in number but each one failed of proof and the District Court so found, except with regard to a practice called blanketing, whereby a number of free samples by the Tribune were placed in Mandan for the stated purpose (by the Tribune) that it was an attempt to build up circulation. The District Court found this to be heavy-handed and a Sherman Act violation, for which damages in the amount of $1.00 were assessed.

Both the Trial Court and the Appellate Court found that the proof of damages on the part of the Pioneer was totally inadequate. The Court of Appeals held, in effect, that conceding virtually all of what the Pioneer argues on the issue of fault, there still could not be a reversal because of the failure of proof on the matter of damages. That court suggested that mismanagement and unreliable records might be a better explanation of the Pioneer's woes.

Petitioner seeks to invoke the jurisdiction of this Court because this decision constitutes a reversal of previous decisions to the effect that a

price discrimination under Robinson-Patman is a price difference, and thus constitutes a prima facie case. Such a statement indicates a misunderstanding of the prior decisions (they do not hold that a price difference is in and of itself a violation of the Act) and of the decision of the Court of Appeals (it does not hold that there was no Robinson-Patman violation but does hold that even if there was, there are no damages and thus there is no reason for reversal).

Nor would this case in any way violate the rule of United States v. Singer, 374 U.S. 174, 10 L. Ed.2d 823, 83 S.Ct. 1773, which holds that where the facts are undisputed, the conclusions derived therefrom are conclusions of law, not subject to the clearly erroneous rule. In this case the facts are very much in dispute and the Trial Court and the Appellate Court in finding no damages proven is making a finding of fact elicited from a vast amount of conflicting facts.

ARGUMENT

I. IN FINDING NO ROBINSON-PATMAN ACT VIOLATION, THE COURT OF APPEALS AND THE TRIAL COURT DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

Petitioner incorrectly asserts that the Court of Appeals failed to find a Robinson-Patman Act violation. What the Court of Appeals said was that, assuming arguendo all of the disputed issues were resolved in favor of the petitioner and there was a violation, nevertheless it would still be unnecessary to remand the case for the reason that "The Pioneer failed to prove that it was injured by the Tribune's price discrimination". (See Court of Appeals decision set forth at page 11 of Appendix A or page 25 of the Petition for Writ of Certiorari.)

In making such a finding, the Court of Appeals was giving petitioner more than it was entitled to as it ignored some significant issues in arriving at this assumptive conclusion. Thus, the Court of Appeals seemed to find that a newspaper is a commodity, such as a can of beer, as distinguished from a service, such as a television news service. (See Note 11 of the opinion of the Court of Appeals.)

And the Circuit Court adopted the petitioner's argument that the Trial Court had used the "market acceptance" standard as distinguished from the physical comparison standard. (See Note 12 of the opinion of the Court of Appeals.) Actually what the Trial Court found was that the newspaper in Mandan was not the same as the one in Bismarck for the reason that late breaking news often did not make the Mandan edition. Moreover, the physical comparison standard is inapplicable to a

newspaper as there is a difference between it and a can of evaporated milk as in Federal Trade Comm. v. Borden Co., 383 U.S. 637. Whereas a can of evaporated milk may be the same, be it labelled under one brand or another, the newspaper is uniquely different, depending upon the area in which it is to be sold. Thus, while a local newspaper may have one value in its immediate area because of its local news, legal publications and advertisements, it will not have that same value in another area. If it is of any value at all, beyond its immediate vicinity, it will be for entirely different reasons, such as its editorials, features or comics. It may be thought that this violates the rule against the "market acceptance" doctrine. To the contrary, it may be that neither the "market acceptance" doctrine nor the "physical comparison" doctrine applies to newspapers. In the case of newspapers, the local paper is uniquely valuable where sold and this has nothing to do with "market acceptance" but goes to its real value.

Further, the Court of Appeals declared in its footnotes (see Note 13) that the Trial Court failed to utilize the "reasonable probability" standard in arriving at its conclusion that the price discrimination did not have the prohibited effect on competition. Actually the Trial Court concluded that the "effect of the price discrimination was not substantially to lessen competition or tend to create a monopoly within 15 USC 13 (a)." In other words the Trial Court went beyond the "reasonable probability" standard and declared that it did not have that effect.

Petitioner, in its petition for a writ of certiorari, reassumes a stance which it urged at the trial and circuit levels to the effect that by merely showing a territorial price difference, its prima facie case is made and a burden is cast upon the respondent to justify by showing one of the exceptions noted in 15 USC 13 (a). Cited is Federal Trade Commission v. Anheuser-Busch, Inc., 363 U.S. 536, 4 L. Ed.2d 1385, 80 S. Ct. 1267. The stance completely ignores what the Supreme Court said in that case, which was to the effect that the holding was very narrowly limited to the meaning of the word "discrimination" in the phrase "price discrimination".

The court carefully points out the narrowness of its decision by saying, at page 553 that there are other elements of a Section 2 (a) violation that were not considered by the court in its decision, among these being that there was insufficient injury to competition.

However much, then, that petitioner may have benefitted by a ruling or rulings that were erroneously misconstrued in its favor, the fact remains that the Circuit Court's decision is founded upon a finding that forecloses the right of the petitioner to seek review in this court, which is that the proof of damages from the alleged violation is wholly inadequate.

Unless, then the court wishes to reverse this finding and consider whether the evidence is sufficient to show an injury resulting from the Robinson-Patman Act violation, this petition should be denied.

II. IN FINDING NO DAMAGES FOR A ROBINSON-PATMAN VIOLATION THE COURT OF APPEALS APPLIED THE WRONG STANDARD AND DISREGARDED AN APPLICABLE DECISION OF THIS COURT.

Petitioner is mistaken in arguing that the Trial Court's finding of no damages was a conclusion of law, based upon an erroneous interpretation of the standard to be applied. Both the Trial Court and the Court of Appeals, reviewing the action of the Trial Court, concluded that the showing of damages was inadequate. The Circuit Court said, in fact:

> "To have awarded more than nominal damages under these circumstances would have been to engage in impermissible speculation and conjecture." (See Appendix A, page 8 or Petition for Writ, page 22)

The two allegations of damage by the petitioner were that (1) advertising revenue was lost; and (2) circulation was caused to be reduced. As to the first, no evidence was introduced as to what the advertising revenue was or would have been absent the blanketing. And, as to the second, the trial court concluded, a conclusion joined in by the Court of Appeals, that it was impossible to determine that if there was a drop in circulation, it was caused by the Tribune's wrongdoing.

The alleged application of the wrong standard does not deal with the matter of damages but in the determination that there had been a violation. Insofar as damages are concerned, the petitioner does not suggest what "wrong test" was used.

Petitioner cites United States v. Singer Manufacturing Company, 374 U.S. 174, 10 L.Ed 2d 823, 83 S. Ct. 1773, as support for its position, quoting from that case to the effect that it was a question of law as to whether the District Court "applied the proper standard to essentially undisputed facts". Arguing further, petitioner says that the Court of Appeals erred in finding as a matter of fact that no damages had been proven since this is a question of law, not to be judged under the clearly erroneous standard of Rule 52 (a).

What the Supreme Court said in the Singer case was that where the facts are essentially undisputed, it is wrong to treat the issue as one of fact but it is an issue of law. In the case before the court, for which certiorari is hereby sought, the facts are disputed in every respect. The Pioneer sought to show first of all that it had a drop in circulation after the new owners assumed control but the facts show that the so-called drop in circulation may have resulted from a switch-over to mail deliveries or from a culling out process of free samples previously given to officials, such as policemen or it could have been entirely illusory because the Pioneer records were so unreliable.

Assuming a drop in circulation, the next question is the reason for this drop. Was it, as the Circuit Court asked, because of the switch-over to morning delivery in an area that has always known only evening delivery? Was it because of the increase in the cost of the Pioneer which occurred shortly after the new publishers took over? Was it because of a switch in editorial emphasis from conservative to liberal? Was it because of resentment engendered by the purchase of the Mandan paper by Bismarck-based owners?

The Pioneer sought to argue that the only reason for the slight drop in circulation was the price difference in the Tribune in Mandan, when at almost all times the local Mandan paper could be purchased by carrier for less money than the cost of the Tribune.

It is clear that the rule in the Singer case is inapplicable.

In like manner, Elyria-Lorain Broadcasting Company v. Lorain Journal Company, 298 F.2d 356, 6th Cir., is clearly distinguishable. That was a case in which the factual situation was undisputed and, yet, the District Court had determined, by a finding labelled as a conclusion of law, that no damages had been shown.

The Court of Appeals said that findings of fact labelled as conclusions of law could be set aside under the clearly erroneous rule. It further found that there was ample evidence of the anti-trust violation and of the damages. Thus, contrary to what petitioner urges in its petition for certiorari, the Court of Appeals in that case acted under the "clearly erroneous" rule of 52 (a).

We have no such case before the court in this case. The facts were vigorously disputed and the District Court and the Court of Appeals both found that the Pioneer failed to prove the fact of injury and failed to prove any damages.

III. THE COURT OF APPEALS ERRED IN FINDING NO DAMAGES PROVIDED FOR VIOLATIONS OF THE SHERMAN ACT.

Petitioner makes essentially the same assertion in connection with damages under the Sherman Act as under Robinson-Patman. In like manner respondent points out that petitioner does not show wherein the Trial Court or the Court of Appeals used a wrong standard insofar as damages are concerned.

The finding of both courts is clear. No damages of any nature were proven which would be sufficient upon which an award of damages could be made. Whether or not either court used a wrong standard in determining that damages were recoverable is irrelevant.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT'S "IMPLICIT HOLDING" THAT THE ADMITTED PRICE DISCRIMINATION WAS NOT VIOLATIVE OF THE SHERMAN ACT WAS JUSTIFIED BECAUSE "THE

PRICING PRACTICE WAS ONE OF OVER THIRTY YEARS STANDING".

Petitioner asserts that continuous conduct does not legitimate conduct which is illegal. Since intent is a key determination in a Sherman Act violation, it could hardly be said that there could have been an intent to monopolize when at the inception of the practice there was no law prohibiting it. Kansas City Star. Co. v. United States, 240 F.2d 643, cert. denied 354 U.S. 923.

Nevertheless, in any event, the Trial Court and the Circuit Court determined that there was a Sherman Act violation. The additional instance of violation of the act would have no effect upon the conclusion that, even conceding a violation, no damages were proven.

V. THE DETERMINATION OF THE LOWER COURTS THAT THE PIONEER WAS ENTITLED TO ONLY NOMINAL DAMAGES ON THE SHERMAN ACT VIOLATION AND PROVED NO DAMAGES ON THE ROBINSON-PATMAN ACT COUNT DISREGARDED FACTS CLEARLY PROVED.

Petitioner makes an unwarranted assumption that any facts were "clearly proved". Everyone, except the Pioneer, agrees that the subscription figures used by the Pioneer from time to time were unreliable.

The Pioneer admits that on taking over the control of the newspaper, a large number of free subscriptions were removed, the total of which is unknown, and there was a large switch on the part of several hundred persons to local mail delivery. In 1967, things were so bad that figures could not be obtained even from the Pioneer's own records upon which to base an estimate of circulation. (Petitioner's Exhibit 50.)

Yet, even accepting the Pioneer's figures as substantiated, its conclusion based thereupon, that the Tribune's activities caused the reduction in Mandan when the circulation was increasing elsewhere fails when it is recalled that the so-called price discrimination existed everywhere else, except in Bismarck. Had the price differential been the determining factor, there should have been a loss elsewhere and there was none.

Petitioner's assertion that the books of the Pioneer were thrown open to Tribune accountants and they found nothing to complain about is also unwarranted by the evidence. More accurately, the Tribune accountants found nothing in conformance with sound business practices and thus could make no conclusions from what they found.

The Trial Court found and the Court of Appeals agreed with the Trial Court that there was no evidence of a loss of 500 subscribers in Mandan. This, petitioner says, is simply untrue. The difference in these results is that petitioner would wish that the Trial Court would accept its unrealistic and unsubstantiated proof and the Trial Court chose not to do

so. Since it is clear that the clearly erroneous standard applies, it would seem unlikely that certiorari would be granted merely to review a disputed record of facts.

Dated this 27th day of June, 1974.

Respectfully submitted,

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